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COURT OF CRIMINAL APPEALS
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PD-0753-20

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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BETHANY GRACE MACIEL
Appellant
v.
THE STATE OF TEXAS
Appellee

Appeal from Brazos County

APPELLANT'S BRIEF ON THE MERITS

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ORAL ARGUMENT WAS NOT PERMITTED

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

The Appellant was found guilty of Driving While Intoxicated after the trial court denied her requested necessity instruction. The court of appeals affirmed on the basis that the Appellant had not satisfied the confession and avoidance doctrine when she testified that because she could not get her car to move, she did not "think" she was operating the vehicle.

STATEMENT OF PROCEDURAL HISTORY

Appellant was arrested on February 1, 2016 for Driving While Intoxicated. Following a jury trial, she was convicted on August 28, 2018 and sentenced to 20 days in jail and a $2,000 fine. Appellant timely filed a Motion for New Trial and after its denial timely filed her Notice of Appeal. On July 16, 2020, the court of appeals affirmed Appellant's conviction in an unpublished opinion. *Maciel v. State*, No. 13-18-00586-CR, 2020 Tex. App. LEXIS 5391 (Tex. App.—Corpus Christi-Edinburg July 16, 2020)(mem. op., not designated for publication). On October 21, 2020, this Court granted the Appellant's petition for discretionary review. The Appellant's brief is due December 7, 2020.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was requested but not granted.

ISSUE PRESENTED

1. Did the Appellant admit to operating her vehicle?

STATEMENT OF THE FACTS

On February 1, 2016, the Appellant was found by Texas A&M Police Officer Phillip Shaw in a vehicle that was stopped in a lane of traffic with smoke coming from the hood (RR2 at 24). When the officer approached, the Appellant was in the driver's seat accompanied by two passengers (RR2 at 26). Although the officer never saw the Appellant move the vehicle, it was still running when he approached, and as he spoke with her, she placed her hand on the manual-gear shifter (RR2 at 27). Based on the odor of alcohol coming from the vehicle and the Appellant's general appearance, the officer suspected the Appellant may be intoxicated (RR2 at 27-29). Following an on-scene investigation, the Appellant was placed under arrest for Driving While Intoxicated (RR2 at 49).

At her trial, the Appellant took the stand on her own behalf and testified that on January 31, 2016, herself, her brother, and her sister-in-law all went together to Northgate—an area in College Station, TX consisting of several bars and clubs—parking her vehicle in a parking garage adjacent to the Northgate District (RR3 at 84-85). While at Northgate, the Appellant had several drinks, drinking to the point that she did not feel safe to drive (RR3 at 85-86). As a result, when the Appellant left Northgate, she testified that her brother drove her vehicle from the parking garage to where it was later found stopped some two miles away, while she rode in the passenger seat and her sister-in-law rode in the backseat (RR3 at 88). However,

after her brother became physically sick while driving and stopped the vehicle in the middle of the road, the Appellant switched seats with him, climbing across the center console into the driver's seat before attempting to move the vehicle to a nearby parking lot out of concern for their safety (RR3 at 89-90). But ultimately her efforts proved futile, as she was unable to move the vehicle possibly because she did not realize the parking brake was on (RR3 at 90).

The Appellant's testimony regarding her brother driving from the parking garage to the point where the vehicle was stopped was not controverted by any other testimony. Furthermore, it was supported by a prior consistent statement testified to by Kendyll Holmes that the day after her arrest, the Appellant, "told me that they left Northgate, Jonathan was driving her car, and then they pulled over when he started to get sick, and that they had switched seats." (RR3 at 110).

Nor was it controverted—either by testimony or the video of the stop that was admitted into evidence—that when the police arrived on the scene, the Appellant was in the driver's seat of the vehicle, the engine was on, and she had her hands on the controls of the vehicle. Further, the Appellant also admitted on the stand that when the officer arrived she was intoxicated (RR3 at 101).

Following presentation of the evidence, the Appellant requested a necessity instruction and submitted a written copy of the proposed instruction (Supp CR at 3-6). The request was denied and the Appellant was found guilty.

SUMMARY OF THE ARGUMENT

The Appellant provided sufficient facts through her testimony at trial for the jury to reasonably infer she was operating the vehicle on the night of her arrest. As such, the court of appeals erred by finding she had not satisfied the confession and avoidance doctrine as required for the necessity defense.

ARGUMENT

I. The Appellant Satisfied the Confession and Avoidance Doctrine.

It is undisputed that the Appellant was found awake behind the wheel of her running vehicle with her hands on the controls after she had tried to move the car to an adjacent parking lot. As such, according to this Court's jurisprudence, she was operating the vehicle. *See Murray v. State*, 457 S.W.3d 446, 449 (Tex. Crim. App. 2015); *see also Kirsch v. State*, 357 S.W.3d 645, 652 (Tex. Crim. App. 2012) ("defining the term 'operate' as 'to exert personal effort to cause the vehicle to function' . . . is an appropriate definition for an appellate court to apply in assessing the sufficiency of the evidence").

Never the less, even though the Appellant admitted to these facts—or at the very least did not deny them—the court of appeals found she had not satisfied the confession and avoidance doctrine required for a necessity instruction because when asked on cross examination what she thought "operating" meant, she replied, "I couldn't get the car to move, so I wasn't driving. I don't think I was operating

it" (RR3 at 102). By so finding, the court of appeals failed to apply this Court's confession and avoidance precedent established in *Juarez*, focusing on an isolated inconsistency rather than examining the Appellant's testimony in its totality to determine whether a jury could reasonably infer she was operating the vehicle.

As she had already admitted to facts that would have allowed the jury to reasonably infer operation, her confusion concerning what operating meant was not a flat-out denial of the charged conduct. Rather, it was within the jury's purview to use any or all parts of her testimony and make whatever reasonable deductions they chose to—including that she was operating the vehicle. Thus, when viewed in its proper light, the Appellant's testimony provided sufficient facts to satisfy the confession and avoidance doctrine as required for a necessity instruction.

A. The Appellant Was Operating a Vehicle.

This Court has previously held that to find "operation" of a motor vehicle, "the totality of circumstances must demonstrate that the defendant took action to affect the functioning of his vehicle in a manner that would enable the vehicle's use." *Denton v. State*, 911 S.W.2d 388, 390 (Tex. Crim. App. 1995). And that, "While driving does involve operation, operation does not necessarily involve driving." *Id*. at 389. As such, courts have traditionally looked to whether a defendant's acts were such that they were intended to cause the vehicle's use, regardless of whether they successfully accomplished their intentions.

Moreover, this Court and others have found that a defendant need not even be conscious to operate a vehicle. The court in *Hearne* found the evidence sufficient to allow the jury to reasonably infer the defendant was operating the vehicle where the defendant was found in his truck in a moving lane of traffic, the engine was running, and the defendant was in the driver's seat, even though he was found asleep with neither of his feet touching the brake or the accelerator, he was resting his head on one hand and the other was in his lap, and the truck was not in gear. *Hearne v. State*, 80 S.W.3d 677, 680 (Tex. App. [1st Dist.] 2002, no pet.). Similarly, this Court in *Murray* found the evidence legally sufficient that the defendant was operating the vehicle where he was found asleep in the vehicle, with the engine running, and with him behind the wheel, even though the vehicle was found parked off the roadway primarily in a private driveway, and there was no evidence when the vehicle was driven to the location where it was found. *Murray*, 457 S.W.3d at 449-50.

In the present case, all the factors that this Court and others have previously held sufficient for operating a vehicle were present—including being conscious with her hands on the controls and admitting that she had been trying to move the vehicle. When Officer Phillip Shaw arrived on-scene he found the Appellant's vehicle stopped in a lane of traffic with smoke coming from the hood—indicating recent use or attempted use of the vehicle (RR2 at 24). The Appellant was in the

driver's seat (RR2 at 26). The vehicle was still running when the officer approached. *Id*. And as he spoke with her, the Appellant placed her hand on the manual-gear shifter (RR2 at 27). Based on these facts, the jury could have reasonably inferred the Appellant was operating her vehicle the night of her arrest.

Thus, the question becomes, did the Appellant on her own provide sufficient facts surrounding this conduct to allow the jury to reasonably infer she was operating the vehicle, or did she flat out deny the conduct in its entirety?

B. *Juarez* Requires a Broader Approach to the Confession and Avoidance Doctrine.

In *Juarez*, this Court addressed the confession and avoidance doctrine as it pertained to the necessity defense where the defendant admitted to the act, but not to the attendant mental state. In that case, the defendant was charged with aggravated assault on a police officer for biting an officer's finger. *Juarez v. State*, 308 S.W.3d 398, 400 (Tex. Crim. App. 2010). At his trial, the defendant testified that while the officer had him on the ground with his face in the dirt, he felt like he was suffocating, and that he somehow ended up with the officer's finger in his mouth, biting down on it to get the officer off of him. *Id*. However, on cross examination, Juarez also testified that he did not intentionally, knowingly, or recklessly bite the officer and that he was just concerned for his life; that it was an accident and he just bit down and let go. *Id*. Following the evidence, Juarez requested a necessity instruction. *Id*. at 400-01. However, the trial judge denied the

request, finding that Juarez was not entitled because he had denied the culpable mental state of intentionally, knowingly, or recklessly. *Id.* at 401.

Following reversal and remand of the trial court's decision by the Twelfth Court of Appeals—which found a defendant need only admit the prohibited act, not the applicable mental state accompanying the conduct—the Court granted the State's petition for discretionary review. *Id*. And while it disagreed with the court of appeal's rationale—holding that a defendant cannot flatly deny the charged conduct, either the act or the applicable mental state—it none the less upheld the court's decision, reasoning that even when a defendant denies the requisite mental state, if he admits to circumstances surrounding his conduct from which the jury could infer the mental state, the doctrine of confession and avoidance would still be satisfied. *See id.* at 405-06.

Juarez thus allows that even where the defendant provides inconsistent or even contradictory testimony, if any of his testimony would provide the means for the jury as the arbiter of facts—and the sole judge of which facts are credible and which are not—to reasonably infer the elements of the offense, then the defendant has satisfied his burden of confession and avoidance. Based primarily on the single statement by Juarez on direct examination that, "I got his finger in my mouth somehow, and I just bit down to get him off of me, because I felt like I was going to die . . ." the jury could have reasonably inferred that by admitting that he "bit

down to get him off of me"—admitting to having a purpose behind his act—that Juarez had the requisite *mens rea* of intentionally, knowingly or recklessly. *Id* at 405. The jury was free to choose this reasonable inference even though Juarez also testified that he did not intentionally, knowingly or recklessly bite Officer Burge's finger, but did it by accident—which would be inconsistent with having a purpose in his act. *Id* at 400.

That the Court eschewed the hyper-technical analysis of a defendant's testimony that would parse every word and often invalidate a defendant's confession based on minor inconsistencies or contradictions, reflects the realities of the challenge that faces any witness testifying who is forced to match wits with a trained professional on cross examination; it does not always turn out well for the witness. As such, it is necessary to look at a defendant's testimony as a whole and see if in its totality, the defendant provides sufficient details for the jury to reasonably infer the elements of the offense; even if during his testimony those details are not always clear and consistent; and may even be contradictory.

C. The Appellant Satisfied the *Juarez* Standard.

In the present case, based solely on the Appellant's testimony, there was more than sufficient testimony provided by the Appellant for the jury to reasonably infer she had operated the vehicle.

The Appellant testified that, "He (the Appellant's brother) felt like he was going to get sick, and he came to an abrupt stop . . . and got out of the car." (RR3 at 89). No mention is made by the Appellant that the vehicle is turned off when her brother came to a stop, allowing the jury to reasonably infer the vehicle was still running. Appellant then testified, "I climbed over from the passenger's seat to the driver's seat to try to move the car . . . out of the middle of the road to the closest parking lot . . ." (RR3 at 90). Appellant has now explicitly admitted to being in the driver's seat and to exerting personal effort to cause the vehicle to function; an admission she reinforced on cross examination when she testified, "I was trying to get the car to safety, to the adjacent parking lot." (RR3 at 98). Finally, in response to the question of why she didn't move the vehicle, the Appellant testified, "I think the parking brake was on," (RR3 at 90) which would again allow the jury to reasonably infer the vehicle was running as she did not respond that she didn't move it because she couldn't get it started.

Taken together, even without the video evidence that clearly showed the Appellant in the driver's seat of a running car, with her hands on the controls—none of which she denied—there was ample testimony given by her that alone would have allowed the jury to reasonably infer she was operating the vehicle.

That she got confused on cross examination and did not know how this Court and others defined operating, and thus testified that she did not think she was

operating the vehicle, did not constitute a flat-out denial of the conduct she had previously admitted to. As the crime of driving while intoxicated has no requisite *mens rea*, the only way she could have in fact denied she was operating the vehicle would have been to deny that she was the same person who the officer found on the night of her arrest—and who the video clearly showed—in the driver's seat of the running vehicle. As such, her understanding of what operating meant was immaterial to whether she admitted to—or at the very least did not deny—facts that would sufficiently allow a jury to make that inference.

D. The Court of Appeals Erred by Finding the Appellant Had Not Satisfied the Confession and Avoidance Doctrine.

Because the Appellant was operating her vehicle according to this Court's and many other's precedent, and because she admitted to facts which on their own would have allowed the jury to reasonably infer she was operating the vehicle, the court of appeals erred by finding she had not satisfied the confession and avoidance doctrine.

The court's reliance on cases that predated this Court's decision in *Juarez*—without addressing if *Juarez* applied—and its reference to counsel's closing argument that, ". . . she was not operating the vehicle because she couldn't . . . that vehicle did not move from that place," are both misplaced. *Maciel*, 2020 Tex. App. LEXIS 5391 at *4-5. As the Appellant's necessity instruction had already been denied prior to closing arguments, defense counsel was left without any other

defensive strategy other than to attack the elements of the offense. Which highlights the danger of an improperly denied instruction on a confession and avoidance defense—it leaves the jury without a vehicle to acquit a defendant who has admitted to all the elements of the offense; and leaves her attorney in the precarious position of having to argue the case inconsistently with the evidence presented. *See Rogers v. State*, 550 S.W.3d 190, 192 (Tex. Crim. App. 2018).

PRAYER

Wherefore the Appellant respectfully prays that this Court find accordingly, reversing the court of appeals decision and remanding this case for further proceedings. Additionally, Appellant prays for any and all other relief to which she may be entitled.

CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4, I certify that the foregoing instrument is 3,469 words long.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing instrument has been electronically delivered to the State's attorney, David Higginson of the Brazos County Attorney's Office, and to the State Prosecuting Attorney, Stacey Soule on December 7, 2020.

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